

(3) (1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

Criminal Appeal No. 115 /2003

APPELLANT

ACCUSED

(IN JAIL)

: Suresh alias Musuwa, aged about 30
years, S/o. Sumeri, R/o. Mohara,
P.S. Basantpur, Distt. Rajnandgaon.

VERSUS

RESPONDENT

: State of Chhattisgarh

**CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CRIMI-
NAL PROCEDURE CODE 1973**

CONVICTION

U/s. 376. 511, of I.P.C.

SENTENCE

R.I. for five years with fine of
Rs. 10000/- in default of
payment of fine, further R.I.
for one year

5/03
20/11/03
Advocate
20/11/03 R **ARISING OUT OF JUDGEMENT, CONVICTION AND SENTENCE
DATED 24.12.2002 PASSED BY SMT. MAITRAYEE MATHUR,
ADDITIONAL SESSIONS JUDGE, RAJNANDGAON IN S.T. NO.
66/2002, STATE VS. SURESH ALIAS MUSUWA.**

HIGH COURT OF CHHATTISGARH, BILASPUR

Single Bench:- Hon'ble Shri Justice Dhirendra Mishra

Criminal Appeal No.115 of 2003

Appellant :- Suresh alias Musuwa

Vs

Respondent :- State of Chhattisgarh

Appellant by Shri G.S. Ahluwalia, Advocate.
State by Shri Vinod Shrivastava, G.A..

JUDGEMENT
(Passed on 13 /07/2005)

The appellant has preferred this criminal appeal against the judgment dated 24th December 2002 passed by the learned Additional Sessions Judge, Rajnandgaon in S.T.No. 66/02 convicting the appellant under Section 376 and 511 of the Indian Penal Code and sentencing him to undergo RI for five years with fine of Rs. 10,000/-, in default of payment of fine to further undergo RI for one year.

2. The prosecution case in brief is that on 18.02.2002 the appellant took the prosecutrix aged about five years and committed rape with her in his house. At the time of incident the father and mother of the prosecutrix had gone out in connection with their work. When they returned back, the prosecutrix narrated the incident to her parents and report of the same was lodged with the police station Basantpur, Rajnandgaon, on 18.02.2002 at about 23.00 hours vide Ex. P/6 by the father of the prosecutrix namely Teekamlal Nirmalkar whereupon offence under Section 376 of the IPC was registered against the appellant. The prosecutrix was examined by the doctor and report of the doctor is Ex.P/4. During investigation vaginal swab of the prosecutrix prepared by the doctor and underwear of the prosecutrix were seized vide seizure memo of Ex.P/3 and the same were medically examined, report of which is Ex.P/2. Thereafter, statements of the witnesses were recorded and chargesheet under Section 376 of the IPC was filed and the case was

committed to the Sessions Court. The learned Additional Sessions Judge, framed charges under Section 376 & 511 of the IPC and the appellant pleaded not guilty. During trial prosecution examined witnesses namely Gopiram P.W. 1, Dr. Lohiya P.W. 2, Yashwant Rao Deshmukh P.W. 3, lady doctor K. Gangajali Wale P.W. 4, Ashok Kumar P.W. 5, prosecutrix Sushila Bai P.W. 6, mother of the prosecutrix Mukhi Bai P.W. 7, father of the prosecutrix Teekamlal Nirmalkar P.W. 8 and grand-mother of the prosecutrix Dulari P.W. 9 and after recording statement of the accused, the Court below found the appellant guilty and convicted him as above.

3. The allegations against the appellant is that when the parents of the prosecutrix had gone out for their work, he took the prosecutrix to his house and committed rape upon her by penetrating his penis in the vagina of the prosecutrix. The incident was narrated by the prosecutrix to her parents on their return. The trial Court has convicted the appellant by relying upon the statements of P.W. 6 Sushila Bai, P.W. 9 Dulari, P.W. 8 Teekamlal and P.W. 7 Mukhi Bai.
4. Learned counsel for the appellant submits that the conviction is based on the statements of P.W. 6 as there is no eyewitness to the incident except the prosecutrix who is aged about five years. He further submits that looking to the age of the prosecutrix, her statement should be minutely examined with caution, as possibility of tutoring cannot be ruled out. It is further argued that even though the prosecutrix was aged five years, oath was administered to her by the trial Court without ascertaining whether she understands the meaning of oath or not. Learned counsel submits that the Court below has convicted the appellant ignoring the material discrepancy and omission present in the statements of the witnesses on the basis of partisan appreciation of the evidence. It is also contended that as the appellant was arrested after about two months of the said incident and no explanation has been given by the prosecution and further that the investigating officer has not been examined, adverse inference ought to have been drawn against prosecution and the appellant ought to have been given the benefit of doubt.
5. On the other hand, learned counsel for the State has supported the impugned judgement of conviction under Section 376 & 511 of the IPC.

6. Having heard learned counsel for the parties and after perusing the entire record as well as the impugned judgment, I am of the view that there is substance in the argument advanced by learned counsel for the appellant. After examining the statement of the prosecutrix P.W. 6, I find that she has been administered oath by the Court below without ascertaining the fact whether she understands the meaning of oath or not and the Court below has heavily relied upon para 2 of her statement wherein she has stated that the appellant after taking out her underwear did "*chodi ke choda*" with her and she narrated this to her mother, father and grand-mother that the appellant left her only when she cried due to pain. The above statement of the prosecutrix cannot be acted upon for the reasons given below;

- 1) that the prosecutrix used the word "*chodi ke choda*" for the first time in her statement before the Court as this is an improvement over her diary statement of Ex.D/1 and even otherwise it is highly improbable that she understands the meaning of the word used by her.
- 2) that her above statement is not corroborated by the version of lady doctor P.W. 4 who has examined her after the incident and found no injury over the person of the prosecutrix.
- 3) that the police registered offence under Section 376 of the IPC on the basis of complaint lodged by the complainant wherein the act of rape has been described in detail.
- 4) that in the cross examination of the prosecutrix she has stated in para 3 that she got her underwear removed by the appellant for passing urine and thereafter she ran to her home after picking her underwear.
- 5) that she answered in the affirmative to the suggestion that the appellant did nothing except taking out her underwear. However, in reply to the questions from the Court she again repeated the word "*chodi ke choda*"
- 6) that in para 4 of her cross examination she has clearly stated that she had deposed as per tutoring given by her parents in her home and,

- 7) that she further stated in her cross examination that she had told the parents that the appellant had taken out her underwear at her instance.
7. Therefore, at this juncture it would be pertinent to mention here that grandmother Dulari P.W. 9 has also made exactly the same improvement over her diary statement of Ex. D/3 because she says that the prosecutrix had told her that the appellant did "*chodi ke choda*" though this word is absent in her diary statement and even in the statements of P.W. 7 and P.W. 8 similar improvement has been made with respect to the act committed by the appellant.
8. Thus, on the basis of the above analysis and particularly considering the fact that no explanation has been advanced by the prosecution for delay of two months in the arrest of the appellant and also for not examining the investigating officer, I am of the opinion that the prosecution has failed to prove the aforesaid offences beyond reasonable doubt and the case of the prosecution hinges solely on the statement of the prosecutrix who is aged five years and as such the Court below ought to have given benefit of doubt to the appellant after appreciating the evidence and material available on record.
9. As a result, the appeal is allowed and conviction of the appellant under Sections 376 & 511 of the IPC is hereby set aside and the appellant is acquitted of all the charges and it is directed that he shall be released forthwith if he is not otherwise required in connection with some other offence and if he has deposited the fine amount in compliance of the order of conviction, the same shall be refunded to the appellant.
10. Parties are entitled for certified copy of the order.

Sd/-
Dhirendra Mishra
Judge